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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

Edwin F. Gordon, Petitioner
v.
George A. Terry, Sr., et al.,
Respondents

APPENDIX

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APPENDIX "A"

Edwin F. GORDON, Plaintiff-Appellant,
v.
George A. TERRY, Sr., et al.,
Defendants-Appellees.

Edwin F. GORDON, Plaintiff-Appellant,
v.
M.M. OVERSTREET, et al.,
Defendants-Appellees.

Edwin F. GORDON, Plaintiff-Appellant,
v.
E. G. GREEN, et al.,
Defendants-Appellees

Edwin F. GORDON, Plaintiff-Appellant,
v.
HOBE PROPERTIES, INC., et al.,
Defendants-Appellees

Edwin F. GORDON, Plaintiff-Appellant,
v.
William Hershey HAMM, III, et al.,
Defendants-Appellees

Nos. 80-5797 to 80-5801

United States Court of Appeals,
Eleventh Circuit

Aug. 30, 1982.

Appeals from the United States District Court for the Southern District of Florida.

Before FAY, VANCE and ARNOLD*, Circuit Judges.

FAY, Circuit Judge:

Plaintiff Edwin F. Gordon allegedly invested approximately four million dollars in five real estate syndications. He is seeking rescission and damages under various sections of the federal securities acts. The District Court found as a matter of law that Gordon had not purchased "securities interests" and granted summary judgement in favor of the defendants. This appeal followed. We reverse summary judgement as to Green and affirm as to the remaining defendants.

* Honorable Richard S. Arnold, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

I. Procedural History

This is the second time these consolidated cases have been presented on appeal. The first appeal was from a dismissal for lack of jurisdiction under Rule 12(b), Federal Rules of Civil Procedure. In view of the state of the pleadings which were described as "verbose, confusing, scandalous, and repetitious,"[1] the panel declined to

1 Gordon v. Green, 602 F.2d 743, 743-44 (5th Cir. 1979). The complaints were described thusly:

> The various complaints, amendments,amended amendments, amendments to amended amendments, and other related papers are anything but short, totaling over 4,000 pages, occupying 18 volumes, and requiring a hand truck or cart

to move. They are not plain, either. The Trial Court described the pleadings as being "extremely long and combin[ing] into single counts detailed recitation of evidence and legal arguments complete with extensive citations of authority." The Court also observed that a paragraph from one typical complaint was single spaced "extend[ed] the full length of a legal page and constitute[d] a single sentence." Much of the pleadings are scandalous as well. Moreover, we cannot tell whether complaints filed earlier in time are to be read in conjunction with those filed later or whether the amended versions supersede previous pleadings.

Id. at 744-45 (footnotes omitted)

During the ensuing years, the complaints and affidavits filed by the plaintiff have improved. The District Court found plaintiff's third amended complaints to be adequate and we agree.

reach the merits, finding instead that the pleadings were not 'short and plain" and did not satisfy the requirements of Rule 8, Federal Rules of Civil Procedure. The District Court's judgment was vacated and the case was remanded for dismissal of the complaints "without prejudice to the right to promptly file a complaint in compliance with Rule 8." Gordon v. Green, 602 F.2d 743, 747 (5th Cir. 1979) (footnote omitted).

On remand, the first set of amended complaints were dismissed by the District Court on Rule 8 grounds. The plaintiff then filed second amended complaints and third amended complaints. The District Court ruled that the third amended complaints

satisfied Rule 8. The third amended complaints allege that the defendants violated various provisions of the federal securities laws[2] and also set forth several state law claims.

[2] Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976), and Rule 10b-5, 17 C.F.R. § 240.10B-5; Sections 5 and 12(1) of the Securities Act of 1933, 15 U.S.C.§§ 77e, 771(1) (1976); and Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1976). The complaints also allege violations under Section 206 of the Investment Advisors Act, 15 U.S.C. § 80b-6 (1976). The Supreme Court, however, has held that no private cause of action for damages exists under § 206. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19-25 (1979). Whether a private cause of action may be implied under § 17(a) of the Securities Act of 1933 has not been resolved by the Supreme Court, the former Fifth Circuit, or this Circuit.

On the basis of the allegations, plaintiff's affidavits, and the written agreements representing each real estate syndication, the defendants moved for summary judgment. The day before the District Court's scheduled summary judgment hearing, the plaintiff submitted a set of fourth amended complaints. Those amendments allege violations of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961 et seq. (1976). Following the hearing, the District Court ruled that federal jurisdiction was lacking and entered an order granting summary judgment in favor of the defendants. Leave to amend the complaints to allege RICO violations was

denied and the pendent state claims were dismissed.

Two issues are presented on appeal: whether the denial of leave to amend the complaints was an abuse of discretion and whether the real estate syndications are securities.

II. The RICO Amendments

[1] Amendments to pleadings are governed by Rule 15(a), Federal Rules of Civil Procedure. Under the rule, a plaintiff may amend once, without leave of court, before responsive pleadings are served. Any subsequent pleadings must be with leave of the court, but

leave to amend "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a).

Plaintiff Gordon originally filed suit in April, 1976. Since the original filing, the plaintiff has filed numerous complaints and amended complaints. At no time, prior to his last attempt to amend the complaints, did the plaintiff assert a cause of action based on RICO. The plaintiff had ample opportunity to assert these claims, yet he waited until the day before the District Court's summary judgment hearing to do so. Counsel for the plaintiff suggested in his memorandum to the trial court that the reason for filing the fourth amended complaints was to avoid decision on the securities issue.

We conclude that the plaintiff unreasonably and unduly delayed in seeking amendment, exhibited bad faith, dilatory motives and has repeatedly failed to cure deficiencies in his pleadings despite numerous opportunities. Allowing amendment at this late date would be prejudicial to the defendants and would not serve the ends of justice. See Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). The trial court's denial of leave to amend was not an abuse of direction. We affirm.

III. A Securities Interest?

A. The Real Estate Syndications

We stress at the outset of our analysis, the procedural posture of this

case. In reviewing a grant of summary judgment, our inquiry must be whether the undisputed facts, considered in the light most favorable to the opposing party, establish that the moving party is entitled to judgment as a matter of law. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); American Telephone & Telegraph Co. v. Delta Communications Corporation, 590 F.2d 100, 101-02 (5th Cir.), cert. denied, 444 U.S. 926, 100 S.Ct. 265, 62 L.Ed.2d 182 (1979). Those facts, gleaned from the pleadings, documents, and affidavits filed in this case, are as follows.

Gordon first met E. G. Green, in October, 1970. Defendant Green told Gordon that he was putting together

several real estate syndicates which would be highly profitable to investors. Green explained that because of his contacts, his unique expertise and his experience with the central Florida real estate market, he was able to purchase large tracts of undeveloped land at bargain prices and to resell the land within two years for substantial profits to a pool of developers. Green explained that the First National Bank of Palm Beach (the Bank) would act as trustee, that attorney Gustave Broberg would prepare the trust documents, and that Broberg and the Bank would assist in the management and resale of the properties. As a result of those representations, Gordon was persuaded to invest in five real estate

syndications. Four of the syndications were governed by trust agreements and the fifth was governed by a limited partnership agreement.

Under the trust agreements, a tract of land is held in the trustee's name (the Bank) and each beneficiary's interest is proportionate to the amount contributed by the beneficiary. The agreements indicate that their purpose is to simplify later resale of the property and disposition of the property is controlled by majority vote of the beneficiaries. Under the limited partnership agreement, George Barley, Jr., is designated general partner and Gordon is listed as one of the limited partners. The agreement indicates that its purpose is investment in real

property. Disposition of the property is controlled by majority consent of the partners.

All five agreements give the investors substanial control over the property. Gordon, however, claims that he did not read the agreements and did not know their terms when he made his initial investments. Gordon states that Green made it a condition of the investment that none of the investors meet each other, that they were to deal only with Green, Broberg, and the Bank, and that they place absolute faith in Green.

B. Williamson v. Tucker

[2] Gordon argues that when he invested in the real estate syndications

he entered into investment contracts and thus "securities" under the federal securities laws.[3]

SEC v. W. J. Howey Co. defines an investment contract as " a contract, transaction or scheme whereby a person [1] invests his money [2] in a common enterprise and [3] is led to expect profits solely from the efforts of the promoter or a third party." 328 U.S. 293, 298-99, 66 S.Ct. 1100, 1102-1103, 90 L.Ed. 1244 (1946). The District Court determined that Howey's third element was not satisfied because under

3 An "investment contract" is one of the terms used by both the Securities Act of 1933 and the Securities Exchange Act of 1934 to define a "security". 15 U.S.C. §§ 77b(1), 78c(a))10) (1976).

the written agreements the investors, by majority vote, retained control over all decisions which would affect the success of the ventures.[4]

[4] The District Court also ruled that profits from appreciation in land were not "profits" under Howey's criteria and that since appreciation was the source of profits, there could be no significant efforts of others directed to producing profits. We agree that investments in land solely for the purpose of profits from appreciation on resale cannot be securities. See I L. Loss, Securities Regulation 491-92 (1962). However, the promises and inducements held out to investors must be considered in determining whether or not a particular transaction is a security. SEC v. C. M. Joiner Leasing Corporation, 320 U.S. 344, 64 S.Ct. 120, 88 L.Ed. 88 (1943); Grainger v. State Security Life Insurance Co., 547 F.2d 303 (5th Cir. 1977), cert. denied, 436 U.S. 932, 98 S.Ct. 2832, 56 L.Ed.2d 777 (1978). Gordon's affidavits claim that Green promised to locate bargain-basement priced land, to structure a leveraging scheme which would result in early and large profits, and to supply a pool of developers ready

to snap at the deal. See infra Section IIIC. These allegations indicated that Gordon was promised greater profits than could be expected from simple appreciation in land values. They also indicate that Green promised significant efforts to make those profits happen. Thus, we agree with the Districts Court's analysis of the law, but we cannot agree with its application. The significant issue in this case is not the nature of the expected profits, or the quality or quantity of the promised efforts. The determinative issue is the very real control given the investors by the written agreements.

On appeal, Gordon argues that Williamson v. Tucker, 645, F.2d 404 (5th Cir.), cert. denied, _____ U.S. _____, 102 S.Ct. 396, 70 L.Ed2d 212 (1981), decided after the District Court entered its order, requires our reversal.

Under the third criteria of the Howey definition, the focus is on the dependency of the investor on the entrepreneurial or managerial skills of a promoter or other party. See SEC v. Koscot Interplanetary, Inc., 497 F.2d 473, 483 (5th Cir. 1974); SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476, 482 (9th Cir.), cert. denied, 414 U.S. 821, 94 S.Ct. 117, 38 L.Ed.2d 53 (1973). An investor who has the ability to control the profitability of his

investment, either by his own efforts or by majority vote in group ventures, is not dependent upon the managerial skills of others. Thus, general partnerships and other arrangements which grant the investors control over the significant decisions of the enterprise are not securities. See, e.g., Schultz v. Dain Corporation, 568 F.2d 612 (8th Cir. 1978); Ballard & Cordell Corporation v. Zoller & Danneberg Exploration, Ltd., 544 F.2d 1059 (10th Cir. 1976), cert. denied, 431 U.S. 965, 97 S.Ct.2921, 53 L.Ed.2d 1060 (1977); Vincent v. Moench, 473 F.2d 430 (10th Cir. 1973); Hirsch v. DuPont, 396 F.Supp. 1214 (S.D.N.Y.1975), aff'd, 553 F.2d 750 (2d Cir. 1977); Oxford Finance Cos. v. Harvey, 385

F.Supp. 431 (E.D.Pa.1974); cf. Cameron v. Outdoor Resorts of America, Inc., 608 F.2d 187 (5th Cir. 1979), modified on other grounds, 611 F.2d 105 (5th Cir. 1980) (promoter retained right to manage property). The written agreements in this case place control over all significant decisions in the hands of the investors and would seem to mandate the conclusion reached by the District Court.[5] Williamson v. Tucker,

[5] One of the agreements in this case is termed a "limited partnership". Limited partnership interests are generally held to be securities interests because the limited partners have no voice in management decisions. See, e.g., SEC v. Murphy, 626 F.2d 633 (9th Cir. 1980); Murphey v. Hillwood

Villa Assocs., 411 F.Supp. 287 (S.D.N.Y. 1976); Kroungold v. Triester, 407 F.Supp. 414 (E.D. Pa. 1975). Hirsch v. duPont, 396 F.Supp. 1214 (S.D.N.Y. 1975), aff'd, 553 F.2d 750 (2d Cir. 1977). The agreement in this case, however, lacks the attributes of a limited partnership because it permits the partners to control, by majority vote, the general partner's decisions regarding partnership property.

however, articulates a narrow exception to the general rule.

The investors in that case were participants in joint ventures in real estate. The written agreements provided that any decision regarding the properties could be made by vote of the holders of 60% or 70% interests in the ventures. The investors in each joint venture expected to either develop the property or sell it after it had appreciated in value and the promoter, Godwin Investments, represented that it would aggressively pursue those objectives.

By their terms, the agreements vested control in the joint ventures and the Fifth Circuit noted that there could be

no security if "the power retained by the investors is a real one which they are in fact capable of exercising." Id. at 419. Proceeding from that point, the Court recognized that under certain circumstances an investor may be incapable of exercising a power given by a written agreement. If that were the case, the investor would be in a position of dependency. With no real means of protecting his investment, he would be forced to rely on others for his hoped for profits.

One situation envisioned by the Court was a dependency on another's

specialized expertise.[6] In setting forth this exception, the Court carefully delineated the circumstances which would create the sort of dependency contemplated by investment contract analysis. The fact that the investor has delegated management duties or has chosen to rely on some other party does not establish dependency.

6 Two other examples were given: (1) an agreement among the parties leaves so little power in the hands of the partner or venturer that the arrangement in fact distributes power as would a limited partnership; or (2) the partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers ... 645 F.2d at 424. The Plaintiff relies on neither of these examples and we see nothing in the record to indicate that they would be applicable.

The investor must have "no reasonable alternative to reliance on that person." Id. at 423. That is, the investor must be "forced to rely on some particular non-replaceable expertise." Id. As an example, the Court indicated that "investors may be induced to enter a real estate partnership on the promise that the partnership's manager has some unique understanding of the real estate market in the area in which the partnership is to invest." Id.

The panel emphasized that when agreements provide investors with substantial control, a plaintiff claiming forced reliance on another is faced with a difficult burden of proof. "Such an investor must demonstrate that, in spite of the partnership form which

the investment took, he was so dependent on the promoter or on a third party that he was in fact unable to exercise meaningful partnership powers." Id. at 424 (footnote omitted). And, in order to survive a motion to dismiss or a motion for summary judgment, the plaintiff must allege at a minimum that the promoter "was uniquely capable of such tasks or that the [investors] were incapable, within reasonable limits, of finding a replacement manager." Id. at 425.

C. Gordon's Allegations - A Genuine Issue of Fact?

[3] Gordon argues that Williamson requires our reversal of the summary judgment order. And, indeed, where

there exists a factual question as to Gordon's dependency we must reverse. But we begin with the written agreements. They undeniably give Gordon control through his voting powers over the fate of his investments. Such control precludes a finding of a security interest unless dependency in the narrow sense articulated by Williamson could be found to exist. In our opinion, dependence upon the skills of one or more defendants does not establish dependency upon all defendants. Williamson requires an examination of the representations and promises made by promoters or others to induce reliance upon their entrepreneurial abilities. Where representations or promises have not

been made or where, if made, they do not involve claims of unique entrepreneurial or managerial abilities, the dependency required by Williamson cannot exist. We therefore examine Gordon's allegations and uncontroverted affidavits as they pertain to each defendant.

Green: Green, a central Florida real estate broker, promoted the land investment syndications. Gordon claims that he relied upon Green's skills and expertise, and that Green represented that he was an expert in selecting bargain-priced central Florida properties which could be resold to his pool of developers within two years at large profits; that [t]he investors' property would be used ... to provide

the financial basis for the developer he selected and thereby give [the] investors a resale price that involved part of the developer's profit"; that he could make such deals because of his contacts and his unique expertise; and that only he knew how to structure the deals.

Broberg, the Bank, and Barley: Attorney Broberg drafted the trust agreements and the Bank served as trustee for the four land trusts. Barley was named general partner in the partnership agreement. Gordon claims that Green represented that his team of money managers consisted of Broberg and the Bank; that Broberg and the Bank assured Gordon that Green was brilliant and that Gordon was fortunate to be an

investor in the syndications; that Broberg and the Bank "claimed great abilities in managing other people's funds"; and that all three defendants represented that they would take care of the "managerial legal, and resale operation."

The Sellers:[7] The Sellers owned

[7] The Terrys, George Terry, Sr., Mary Terry, George Terry, Jr., and Netsy Terry; the Overstreets, Estate of M. M. Overstreet, Jeannette Overstreet, Jennings Overstreet, and Jo Ann Overstreet; the "Hovey Trust" defendants, Alice Rhoades, George Coleman, Dudley Sutphin, Harold Heye, Virgil Scherrill, Henry Rudkin, Samuel Sutphin, Pierre Heftler, and William Rudkin; Francis Buckley, representing Hobe Properties, Inc., and Hobe Sound Estates, Inc.; and the Hamms, William Hamm and Edward Hamm. It appears from the record that George Terry, Jr., Netsy Terry, George Coleman, William Hamm, and Edward Hamm were never properly served. Those persons were therefore not before

the District Court when it entered its summary judgement order and are not before this Court on appeal. Since they are not parties to the case, our ruling does not extend to them. Moreover, Gordon dismissed the Terrys with prejudice in April, 1976. Gordon claims that Gordon v. Green permits him to rename the Terrys as defendants in his third amended complaint. The Gordon panel held that "the filing of a proper, decent, acceptable amendment will relate back to the original filing." 602 F.2d at 747. If the Terrys could properly be named in the complaints Gordon would permit relation back. As it is, they were dismissed with prejudice and it appears that their inclusion is not proper. However, the District Court did not rule on this issue. In view of our holding, infra, we need not and do not address the issue of relation back as it applies to the Terrys.

property which was acquired by the five real estate syndications.[8] Green makes no claim that these defendants ever made any representations. His complaints and his affidvaits assert only that the sellers "conspired" with Green and that Green was their "agent".

The "Inside" Investors:[9] These defendants were co-investors in certain of the real estate syndications. Again, no claim is made that these

[8] Apparently a two-tiered transaction was involved. The sellers sold the property to Heminway Corporation, which was substantially owned and controlled by Green. The Heminway Corporation in turn sold the property to the real estate syndications.

[9] T. R. Anderson, Robert D. Lacey, Pierre Heftler, and William Rudkin are named as "defendant inside investors."

defendants ever represented anything to Gordon. Gordor alleges only that they "conspired" with Green and that Green was acting under their "control."

[4] We believe that taking the allegations as supported by affidavits in the light most favorable to Gordon, they are sufficient to preclude summary judgment as to Green only. Gordon has set forth specific statements made by Green which, if proven, demonstrate that Green represented himself to have unique knowledge regarding the real estate market in central Florida and the contacts and expertise to structure highly profitable deals. Whether Green's represented skills created the

dependency contemplated by Williamson is a question of fact which cannot be resolved on the present record. Gordon must be given an opportunity to prove his assertions.

[5] In contrast, the allegations and claims against the other defendants are far from sufficient to raise a factual question.

Regarding the Bank, Broberg, and Barley, Gordon's assertions demonstrate that the Bank and Broberg had confidence in Green's expertise, that they assured Gordon his investments were in good hands, and that they claimed to be skilled in their respective occupations. Last, we are told that all

three defendants agreed to manage the syndications. In order to establish a genuine factual dispute, affidavits must set forth facts which are relevant to a viable legal theory. Spectrum Financial Cos. v. Marconsult, Inc., 608 F.2d 377, 380 (9th Cir. 1979) cert. denied, 446 U.S. 936, 100 S.Ct. 2153, 64 L.Ed.2d 788 (1980); First National Bank Co. v. Insurance Co. of North America, 606 F.2d 760, 766 (7th Cir. 1979). The alleged statements and acts of these defendants simply do not raise an issue of dependency under Williamson's narrow exception. Gordon does not contend that the three defendants possessed unique knowledge or skills, nor does he set forth facts from which we could infer

such expertise. Summary judgment as to the Bank, Broberg, and Barley is therefore affirmed.

Regarding the sellers and the co-investors, the record is, for all practical purposes, non-existent. The complaints and affidavits allege no specific facts or representations pertaining to these defendants. Bare assertions that the defendants "conspired," "controlled," or retained Green as their "agent" are insufficient to create an issue as to Gordon's dependency on these defendants or to demonstrate the sort of relationship between the defendants and Green which would create a question as to imputed

knowledge or responsibility.[10] Conclusory allegations such as these, without specific supporting facts, have no probative value. SEC v. Bonastia, 614 F.2d 908, 914 (3d Cir. 1980); Broadway v. City of Montgomery, 530 F.2d 657, 660 (5th Cir. 1976); Benton-Volvo-Metaire, Inc. v. Volvo Southwest, Inc., 479 F.2d 135, 139 (5th Cir. 1973). Summary judgment as to the

[10] We note that in conjunction with their motion for summary judgement, Anderson and Lacey submitted affidavits in which they denied having any connection, either as sellers or as co-investors, with the Magnolia Ranch real estate investment, Case No.80-5797, the only case in which they were served. Gordon has not responded to their assertions.

sellers and the co-investors is affirmed.[11]

Our opinion deals with a very narrow issue, jurisdiction under the federal securities laws. The protection provided by the securities acts is not limitless, not every fraudulent commerical transaction falls within

[11] The District Court granted summary judgment as to all the defendants although some of the defendants never responded to the third amended complaints. In view of the tortured procedural history of this case, the full and fair summary judgment hearing afforded by the tial judge, and particularly in view of the fact that no party has raised the issue, we have determined that a remand limited to those defendants, based on such a technicality, would not be in the interests of judicial economy. We therefore affirm summary judgment as to all defendants but Green.

their ambit. Marine Bank v. Weaver, _____ U.S. _____ at _____, 102 S.Ct. 1220 at 1223, 71 L.Ed.2d 409 (1982) ("Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud.") The allegations and affidavits in this case are sufficient to raise an issue only as to Gordon's dependency on Green's skills. The plaintiff may have common law and statutory claims against the remaining defendants, but he does not have a securities claim. In selecting the federal securities acts as a means to obtain redress, Gordon has chosen a most difficult route. On remand he will be faced with the burden of proving that his dependency on Green

rendered him incapable of exercising the powers the written agreements vested in him. His path would have been more direct and much simpler in a state court. Summary judgment is reversed as to defendant Green and affirmed as to the remaining defendants.

AFFIRMED IN PART, REVERSED IN PART and REMANDED.

VANCE, Circuit Judge, concurring in part and dissenting in part:

I concur in the reversal as to defendant Green. I dissent with respect to defendants Broberg, Barley, Heminway

Corporation and First National Bank in Palm Beach; and would reverse the summary judgment in favor of those defendants. I concur in the result of the affirmance as to all other defendants.

APPENDIX "B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 76-8151-Civ-CA
76-8152-Civ-CA
76-8153-Civ-CA
76-8154-Civ-CA
76-8155-Civ-CA

EDWIN F. GORDON,
Plaintiff,
vs ORDER OF DISMISSAL
GEORGE A. TERRY, SR.,
et al.,
Defendants.
_____/

THESE CASES are before the Court on several motions for summary judgment and for dismissal for failure to state a claim. The Court, having considered the various legal documents and affidavits submitted by the parties concludes that there is no genuine issue of material fact and grants the defendants' motions

for summary judgment in each of the above-styled cases.

PROCEDURAL HISTORY

Before discussing the merits of the summary judgment motions, a brief description of the procedural history of these cases is required. The plaintiff, Edwin F. Gordon, first filed his complaints in the Southern District of New York in March and April of 1976. The cases were transferred to the Southern District of Florida and assigned to Judge Charles Fulton. Due to a prior encounter with defendant Green, Judge Fulton regretfully recused himself while several motions were pending. The cases were re-assigned to this Court.

The complaints as originally drafted were virtually incomprehensible but the Court (mistakenly it turned out) nevertheless endeavored to ascertain their meaning. The complaints were accompanied by a multitude of affidavits, supporting documents, amendments and amendments to amendments. The Court, unable to decipher the language of the various written documents, set the cases for a hearing in September of 1976 in order to allow the plaintiff an opportunity to explain what he was attempting to assert in the various complaints. Immediately prior to the hearing the plaintiff filed yet another amendment to the amended complaints.

At the hearing, at which plaintiff and his counsel responded frankly to certain questions regarding the subject matter of the complaints, the Court concluded that the plaintiff had failed to allege that a security was involved and, as a result, the Court was without jurisdiction. See Transcript of Hearing on Motions, September 20, 1976. The Court's conclusion was subsequently expressed in an Order and memorandum dated September 30, 1976. In that Order the Court noted that a dismissal for failure to comply with Fed.R.Civ.P. 8 would also have been appropriate considering the state of the plaintiff's pleadings.

On appeal, the Fifth Circuit declined to decide the securities

issue. Instead, the appellate court took a brief look at the voluminous pleadings and concluded that the plaintiff had failed to comply with Rules 8(a) and 8(c), requiring a short concise statement of the facts supporting a claim for relief. The Fifth Circuit vacated this Court's previous Order and remanded the cases for re-pleading. While the Court regrets the Fifth Circuit's avoidance of the dispositive securities issue, the Fifth Circuit's conclusion that the original pleadings should have been dismissed was certainly warranted.

Since the remand the plaintiff has filed three sets of amended complaints. The first set of amended complaints, though shorter and clearer than the

original pleadings, suffered from many of the same deficiencies. The amended complaints were largely conclusory and failed to state the factual basis for the plaintiff's claims. The plaintiff then filed his "Second Amended Complaints" and, before the Court ruled on the sufficiency of those complaints, his "Third Amended Complaints". The Third Amended Complaints comply with Rule 8. Although the allegations continue to be somewhat conclusory rather than factual, they are sufficiently clear to enable the Court and the parties to determine the basis of the plaintiff's claim for relief.

At this point several of the defendants, growing impatient with the seemingly infinite number of amended

complaints, called for summary judgement. The defendants Green and Heminway Corporation moved for an evidentiary hearing for purposes of demonstrating that these cases are factually identical to Morsey v. Green, Case No. WPB-76-8044-Civ-CA. In Morsey, a case involving defendant Green and a transaction essentially the same as the transactions alleged by this plaintiff, this Court concluded after a trial pursuant to Rule 42(b), that no security was involved. That decision was affirmed by the Fifth Circuit without opinion. Morsey v. Green, 615 F.2d 417 (5th Cir. 1980).

The plaintiff requested a continuance in order to prepare a reply to the various motions for summary

judgement. The Court granted the continuance and set the cases for a hearing. The hearing was to be limited to the issue of whether a security is involved. The plaintiff was given a month and a half in which to depose the principle defendants for purposes of eliciting facts in support of his theory that what he purchased was a security. As a result of various scheduling conflicts, plaintiff claims that he was unable to conduct the depositions.[1] Instead of requesting a continuance,

[1] Counsel for the defendent Green asserted at the hearing that Green was available for a deposition and that the plaintiff simply failed to schedule it.

however, the plaintiff waited until approximately a week before the scheduled hearing and then sought to cancel the hearing. In his motion to cancel the plaintiff also asked the Court to recuse on the ground that the Court had heard and decided portions of the Morsey case. The plaintiff's motion for recusal was wholly without merit and was denied. Order of July 24, 1980. See, e.g. In Re Corrugated Container Anti-trust Litigation, 614 F.2d 958 (5th Cir. 1980).

The Court granted the plaintiff's motion to cancel the hearing and notified the parties that the summary judgement motions would be decided without benefit of a hearing. Shortly thereafter, the plaintiff submitted

still another memorandum of law and an additional affidavit in support of his theory that the interest he purchased is a security. The plaintiff also requested oral argument on the pending summary judgment motions.

At this point, the Court was somewhat perplexed by the plaintiff's vacillating requests but nevertheless reset the cases for oral argument. On the day before the scheduled hearing, the plaintiff submitted the latest in a now illustrious series of amendments. The latest amendment alleges violations of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961, et seq. ("RICO"). Accompanying the proposed amendment was a memorandum stating that a hearing was no longer

necessary because the Court had jurisdiction under the RICO Act. Disregarding the latest amendment for the present, the Court proceeded with oral argument.

After this long convoluted history the Court is in essentially the same position in which it found itself four years ago. The complaints are better drafted but the claims are essentially the same. Despite the plaintiff's numerous factual allegations and legal memoranda, the Court is compelled to reach the same conclusion reached in September of 1976: There is no security alleged; the claims based on the federal securities laws must be dismissed and; assertion of pendent jurisdiction over the remaining claims is not appropriate.

I. Whether the interests purchased by the plaintiff constitute securities.

The allegations which support the plaintiff's theory that a security is involved may be summarized as follows. In October 1970, the plaintiff, Dr. Gordon, met with defendants, E. G. Green, Gustave Broberg and First National Bank of Palm Beach (hereinafter "FNBPB"). Green told Dr. Gordon that he was in the process of organizing various land investment syndicates which would yield substantial profits to the investors. Green represented that because of his vast familiarity with land sales in Florida, he was able to purchase large tracts of land at bargain prices and to resell the land to

developers at a substantial profit. Broberg and FNBPB assured Gordon that Green was an extremely knowledgeable Florida real estate broker. According to the third amended complaints and Gordon's various affidavits, Gordon was persuaded to commit himself to investing $10 million and actually invested $4.5 million with Green, Broberg and FNBPB who promised to manage the plaintiff's fund and to invest those funds in various land syndicates.

In cases No. 76-8151 through 8154 the transactions were designated "trust agreements". The agreements specified that a tract of land was to be held in the trustee's name for the benefit of the various contributors/beneficiaries. Each contributor received an interest in

the trust proportionate to the amount contributed. Gordon's interests varied from 10% of the Overstreet trust agreement (No. 8152) to 30% of the Hobe trust (No. 8153) to 40% of the Magnolia Ranch (No. 8151) and Hamm trusts (No. 8154).

Paragraph 2 of each trust agreement vests control over disposition of the trust in the beneficiaries:

> 2. That in transacting any business relative to the property, especially in selling the same and determining the terms under which the sale of said property will be made, the Trustee shall be governed and controlled by the majority consent of the Beneficiaries in accordance with their percentage of ownership, and all parties hereto shall be bound and controlled by such decision. When a bona fide offer is received and a majority agree to accept said offer, any or all of the minority shall have the right to retain ownership of the property by

purchasing the interest of the majority on the same terms and conditions as the offer.

The trust agreements do not contemplate any development of the various tracts of land, nor were any representations made that any of the defendants would personally undertake development. Green did represent that he knew of developers who were willing to purchase the land within two years.[2] The only purpose behind

[2] Plaintiff's latest affidavit, submitted after the hearing, claims that development was anticipated but the only development contemplated appears to be by subsequent purchasers and not the defendants who sold the interests in the trust agreement to Gordon. Whether subsequent purchasers chose to develop the land has no bearing on the issue of whether the interest purchased by Gordon constitutes a security.

forming the trusts was to create a device for holding the land for later resale. Paragraph 8 of the agreements so states:

> 8. This is the joint venture of the parties, with each party being liable for his portion of any liability incurred or any tax incurred. The purpose of the parties in making this trust agreement is solely for the simplicity in holding title and conveying.

In case No. 8155 the alleged security is an interest in a limited partnership. The limited partners were given somewhat less control over management of partnership affairs. With the exception of the decision to sell partnership real estate, the general partner was given the power to make all decisions regarding the partnership. In

the partnership, as in the trust agreements, no development was contemplated. The partnership was formed solely for the purpose of investing in land.

Dr. Gordon's version of the transaction varies from the terms of the agreements. Dr. Gordon claims that he never read the agreements until shortly before instituting this suit. According to Dr. Gordon, the terms of the agreement form no part of the investment he made. Dr. Gordon claims, simply, that he placed complete trust in Green, Broberg and FNBPB and turned over $4.5 million to these defendants to dispose of at their discretion. While Dr. Gordon may have been unaware of the terms of the agreements, it is undisputed that he was not prevented

from reading the agreements prior to signing and that the terms provide for substantial control by the beneficiaries.

A. The Trust Agreements

In this Court's Order and memorandum opinion dated September 30, 1976, the Court concluded that the trust agreement interests do not constitute securities. For the reasons stated in that opinion and for the reasons that follow, the Court concludes, again, that the trust agreement interests do not constitute securities.

The term "security" is not specifically defined by the federal securities acts but the term does include an "investment contract". 15 U.S.C. § 77(b)(1); 15 U.S.C. § 73(c)(a)(10). Generally, an investment in land in the hope of realizing a

profit from appreciation in the value of the land is not considered an investment contract. As described by Professor Loss in his treatise on securities,

> The line is drawn, however, where neither the element of a common enterprise nor the element of reliance on the efforts of another is present. For example, no "investment contract" is involved when a person invests in real estate, with the hope perhaps of earning a profit as the result of a general increase in values concurrent with the development of the neighborhood, as long as he does not do so as part of an enterprise whereby it is expressly or impliedly understood that the property will be developed or operated by others.

1 Loss, Securities Regulation 491-92 (2d Ed. 1961).

An investment in land may constitute an investment contract if the investment meets the Supreme Court's definition of an "investment contract" in SEC v. W. T. Howey Co., 328 U.S. 293, 398-99 (1946):

> . . . a contract, transaction, or scheme whereby a person invests his money in [1] a common enterprise and is led to [2] expect profits [3] solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.

Only if all three elements are present does an investment in land constitute a security. See Cameron v. Outdoor Resorts of America, Inc., 608 F.2d 187 (5th Cir. 1979).

1. Common Enterprise

The first element of the Howey test - a common enterprise - is clearly met. Each of the participants cooperated in the purchase of land through the trust. The funds of the individual investors was pooled so that the large tracts

could be purchased. The pooling of funds for investment is generally considered sufficient to constitute a "common enterprise". See, e.g. Hirk v. Agri-Research Council, Inc., 561 F.2d 96, 100 (7th Cir. 1977).

2. Expectation of Profits

The second element of the Howey test - expectation of profits - is not present in these transactions. Profits for securities purposes means "either capital appreciation resulting from the development of the initial investment . . . or participation in earnings from the use of the investors' funds. . . ." United Housing Inc. v. Forman, 421 U.S. 837, 852 (1975). Gordon's profits were to come solely from appreciation of the land not appreciation through development. No development of the land

was even contemplated. See, e.g., SEC v. Joiner Leasing Corp., 320 U.S. 344 (1943) (profits expected from promoter's promise to drill exploratory oil well); Cameron v. Outdoor Resorts of America, Inc., 608 F.2d 187, 193 (5th Cir. 1979) (profits expected from promoter's promise to provide and manage various campsite facilities on undeveloped land purchased by investors). Nor was Gordon led to expect profits through earnings from the use of his funds such as rental payments of dividends. See Tcherepin v. Knight, 389 U.S. 332 (1967) (dividends).

Merely because real estate market trends may affect whether a profit is realized, however, does not by itself exclude the transaction from the purview of the securities laws. Market trends affect every investment to some extent.

See Altschuler v. Cohen, 471 F.Supp. 1372, 1380 (S.D. Texas 1979). If, however, profits are anticipated solely from appreciation in land value and not from any development by the promoter or third party, no security is involved. See, e.g., Cameron, supra at 193; Davis v. Rio Rancho Estates, Inc., 396 F.Supp. 1045 (S.D.N.Y.) 1975); Happy Investment Group v. Lakeworld Properties, Inc., 396 F.Supp. 175 (N.D. Cal. 1975); Weiner v. Brown, 356 So.2d 1302 (Fla. 3 DCA 1973); McConathy v. DalMac Commercial Real Estate, Inc., 545 S.W.2d 871 (Tex.Civ.App. 1977). 1 Loss, Securities Regulation 491-92 (1961); Real Estate as Securities: Sales of Residential Subdivision Lots, 1979 Wash. U.L.Q. 965, 985-88.

3. Solely from the Efforts of Others

The third element of the Howey definition - solely from the efforts of others - is also lacking.

While many lower courts have not read the Howey language literally, the efforts of others necessary to render a transaction an investment contract must be at least the "undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476, 482 (9th Cir.) cert. denied, 414 U.S. 921 (1973). The only effort offered by these defendants was to seek out qualified purchasers. The defendants promised no development nor any significant management services. The "failure or success of the enterprise" was dependent primarily on the anticipated rise in

land value, not any effort on the part of the defendants.

That profits were expected from the anticipated rise in the value of land and not from the efforts of the defendants is made clear by consideration of the risk taken by the plaintiff. In the typical land based security, the purchase price of the security exceeds the value of the land. This is because the investor is purchasing, in addition to the interest in land, the promise of the promoter to develop. Since the purchase price exceeds the market value of the land, the buyer risks a loss if the promoter fails to perform. See, e.g. McCown v. Heidler, 527 F2d 204 (10th Cir. 1975); Real Estate as Securities: Sales of Subdivision Lots, 1979 Wash. U.L.Rev

965, 987. By contrast, Gordon paid, according to his own affidavits, below market value for the land. There was no premium attached to the price of the land which would account for the efforts of the defendants. Since Gordon paid bargain rates for the land, Gordon took no risk that the defendants would fail to perform. Even if the defendants did nothing, he retained his interest in the land and could sell it to recover all of his investment.

Moreover, the trust agreements provide for control of the trust by majority vote of the beneficiaries. The beneficiaries were relying on their own entrepreneurial skills, not those of Green. Gordon, as owner of substantial shares in each agreement, possessed even greater power over disposition of the

trusts than did most other beneficiaries. The securities laws were not meant to apply where disposition of the investment is subject to the control of the investors. See, e.g., Mr. Steak, Inc. v. River City Steak, Inc., 460 F.2d 466 (10th Cir. 1972).

The scheme can best be described as a joint venture for the purchase of land. The agreements so describe themselves in paragraph 8. Because each joint venturer has a voice in the affairs of a venture, the essential element of reliance on the "efforts of others" is lacking and, as a result, joint ventures are not generally considered securities. See, e.g., Oxford Finance Cos. v. Harvey, 385 F.Supp. 431 (D.C. Pa. 1974). A joint venture may be considered a security

where the investor is denied any real participation in management affairs, see, e.g., Andrews v. Blue, 489 F.2d 367, 371 (10th Cir. 1973), but not where the investor has the right to participate and merely fails to exercise that right. Fargo Partners v. Dain Corp., 540 F.2d 912, 915 (8th Cir. 1976). The use of the trust device does not magically transform this joint purchase of land into purchase of a security.

The plaintiff has referred the Court to several recent cases which he contends requires the conclusion that a security is involved. The cases cited are substantially dissimilar to this case as a quick review will demonstrate.

The most recent case cited by the plaintiff is Cameron v. Outdoor Resorts,

Inc., 608 F.2d 187 (5th Cir. 1979). Outdoor Resorts developed a campsite composed of nearly a thousand lots. Outdoor Resorts promised to make significant improvements to the undeveloped lots including the construction of swimming area, a golf course, tennis courts and utility connections. The lots were sold to individuals for personal use. Outdoor Resorts retained the right to rent the lots in the owner's absence and to pay the rent received to the owners after deducting certain operational and managerial expenses. The Fifth Circuit concluded that a security was involved since profits were to be realized as a result of appreciation through the promised development and the lot owners relied solely on the managerial efforts

of Outdoor Resorts. A statement of the facts shows the dissimilarity between Cameron and this case. Here profit is expected from increase in land value without development, in Cameron profit arose from the development of the campsites. Moreover, the campsite owners, unlike Gordon, had no voice in the management of their investment.

The recent decision in Altschuler v. Cohen, 471 F.Supp. 1372 (S.D. Texas 1979) is similarly distinquishable. In Altschuler, the participants purchased four per cent interests in a land syndicate in anticipation of profits from resale of the land. The court found that the interests purchased constituted securities because "[i]t was not contemplated that [the participants] themselves would actively participate in

the affairs of the venture." 471 F.Supp. at 1380. The court's analysis of the securities issue is notably sparse but even assuming the correctness of the decision, the decision does not compel a finding of a security in this case. Unlike the participants in Altschuler, the trust beneficiaries in this case had the right to participate in all management decisions.

Finally, the plaintiff cites Bartels v. Algonguin Properties, Ltd., 471 F.Supp. 1132 (D.Vt. 1979). Like the participants in Altschuler, the limited partners in Bartels were not permitted to participate in management decisions. In addition, the funds supplied by the limited partners were used for development of the land purchased by the partnership. The right of Gordon to

participate in management decisions and the lack of any development distinquish Gordon's investments.

The plaintiff has also attempted to characterize his beneficial interest as a "discretionary account in land." Some courts, including the Fifth Circuit, have concluded that discretionary accounts in commodities futures contracts may constitute securities. See Moody v. Bache, 570 F.2d 523 (5th Cir. 1978); SEC v. Continental Commodities Corp., 497 F.2d 516, 522 (5th Cir. 1974). But see Milnarik v. M-S Commodities, 457 F.2d 274 (7th Cir.), cert. denied, 409 U.S. 887 (1972). See generally Moreno, Discretionary Accounts 32 U. Miami L. Rev. 401 (1977). The commodities cases are inapposite. The volatility with

which commodities are bought and sold is not present in land transactions. When one invests in a commodities account, reliance is placed on the broker's expertise in selecting which commodities to purchase or sell and when to purchase and sell them. The broker's expertise in buying and selling are the "efforts of others" which make a commodity account a security. See SEC v. Continental Commodities Corp., supra at 522. A sale or purchase of land, on the other hand, requires compliance with numerous formalities. Land is not bought and sold overnight. More importantly for this case, unlike a commodity account broker, Green did not have complete control over the decisions to buy or sell. Even assuming that Green chose which tracts of land would

yield the greatest profits, Gordon was required to acquiesce in each purchase by signing the appropriate trust agreement. If Gordon was not interested in the particular tract, he could simply not enter into the agreement. The mere fact that Gordon trusted Green to recommend lucrative properties does not render the investment a security. Moreover, commodities futures investors have no authority over the sale of the commodities contracts. Gordon did have the right to stop the sale of the land or to seek out a willing purchaser if he thought a sale appropriate.

The cases cited by the plaintiff are significantly different from this case. Two state cases not cited by the plaintiff are significantly more analogous. McConathy v. Dal Mac

Commerical Real Estate, Inc., 545 S.W.2d 871 (Tex. Ct. Civ. App. 1977); Weiner v. Brown, 356 So.2d 1302 (Fla. 3d DCA 1978). In both cases the transactions were virtually identical to Gordon's trust investments and in both cases no security was found under the state securities law.

In McConathy v. Dal Mac Commerical Real Estate, Inc., supra, investors purchased shares in a joint venture virtually identical to the transaction in this case. The stated purpose of the joint venture was to buy and hold a parcel of real estate "as an investment which we hope will appreciate in value during the holding period. We anticipate selling the property for a profit at some future date and realizing a capital gain." 545 S.W.2d at 874

(quoting from the joint venture agreement). The agreement, signed by all the participants, provided for management by a single individual and for participation of the venturers in any decision regarding sale of the land. The agreement, like the agreements in this case, provided for forfeiture upon failure to make a required contribution. There was even dispute as to whether the plaintiff had read the agreement. Id. The court concluded that no security was involved because the joint venture lacked an essential element of an investment contract. According to the Texas court, "[e]fforts' of a promoter or others means operational, managerial or developmental efforts. . . not . . . the mere holding of property in anticipation

of appreciation in value." 545 S.W.2d at 875. Moreover, there was no reliance on the skills of a promoter since each venturer had the right to participate in the decision to resell. Id. at 876.

A similar scheme was considered in Weiner v. Brown, 356 So.2d 1302 (Fla. 3d DCA 1978). The transaction described in Brown is exactly the same as the transaction in this case. A real estate broker induced several persons to participate in the purchase of a certain tract of unimproved land. The property was purchased in the name of two trustees. As the court described the scheme:

> The property thus acquired was to be held for resale, hopefully at a profit. No development or improvements were made thereon, and no business was conducted thereon.

> There was no plan or expectation to receive profits from the efforts of any other persons, or from any source other than by favorable resale. The control of the property was in the beneficiaries. The trustees were authorized to negotiate for resale opportunities, but the trustees were required to notify the beneficial owners of any proposed resale, and no such sale would be made if objected to by one-third or more of the beneficiaries. The trust agreement additionally provided for the trustees to collect the amounts when due from the beneficiaries for required payments of mortgage principal and interest, and taxes, assessments or other expenses. There was a provision that upon default by a beneficial owner in payment of such items due from him the other beneficiaries would be charged ratably therefor and the interest of the defaulting beneficiary would be forfeited. It was provided that the trust would continue until the "assets have been liquidated and distributed" which, in this instance, would be until the property was resold and the proceeds distributed.

356 So.2d at 1304. Applying the Howey definition of a security, the court

concluded that no security was involved. The court held that merely taking title in the name of a trustee did not transform a purchase of land into a purchase of a security. The use of the trust device was merely for the convenience of the purchasers who themselves retained ultimate control over disposition of the land.

The foregoing makes clear that the trust agreements, on their face at least, are not securities. The agreements lack the essential elements of "profits solely from the efforts of a promoter or third party." SEC v. Howey, supra. The profit was anticipated from the rise in land -- not from any development of the investment. The efforts of the promoters was limited to seeking out purchasers. The trust

beneficiaries retained substantially complete control over management and disposition of the various tracts of land. Disregarding form for substance, the scheme is simply a joint purchase of real estate. See SEC v. Howey Co., 328 U.S. 293, 300 (1945); United Housing Foundation v. Forman, 421 U.S. 837 (1975). The use of the trust device, by itself, does not transform the purchase of land into a purchase of securities.

The plaintiff has raised a broader claim, however. He asserts that the Court should ignore the terms of the trust agreements and instead decide the issue of whether a security is involved solely on the basis of the oral representations allegedly made to Gordon by Green, Broberg and FNBPB. Gordon claims, that he never even read the

provisions of the trust agreements until shortly before bringing this action.

In deciding whether a purchaser has been offered a security, a court cannot ignore the representations made by the offeror. The determination of whether an instrument constitutes a security requires a court to "take into account all the circumstances attending the sale . . . . " Grainger v. State Security Life Insurance Co., 547 F.2d 303 (5th Cir. 1977). The Court does not read Grainger as requiring a court to ignore the written terms of an agreement, however, merely that the terms of an agreement are not dispositive of the issue of whether a security is present. To completely ignore the terms of a written instrument would be just as great an error as to ignore the oral

representations.

Even assuming Gordon was induced to purchase interests in the various trusts by Green's representations that Gordon need not participate in any of the details, Gordon has still failed to show the existence of a security. Green's representations amount to little more than the representations of any real estate broker seeking to sell land as an investment. See Timmreck v. Munn, 433 F.Supp. 396, 403n.4 (N.D.Ill. 1977). Green told Gordon the land would make a good investment because it was in a prime location and ripe for development. Green also promised to provide developers who would purchase the land from the trusts at a substantial profit. Essentially, Green promised to act as a real estate broker. Acceptance

of the plaintiff's theory that Green was offering the sale of a security would require the Court to conclude that nearly every real estate broker who deals in real estate for investment is a securities dealer. Such an extension of the securities laws is wholly unwarranted. See, United Sportfishers v. Buffo, 597 F.2d 661 (9th Cir. 1979); McCown v. Heidler, 527 F.2d 204, 208 (10th Cir. 1975); 1 Loss, Securities Regulation 491-92 (2d Ed. 1961).

B. The Limited Partnership.

This Court's Order of September 30, 1976 did not address the issue of whether interests in the Barley limited partnership agreement constitute securities. Limited partnership interests, because they often meet the Howey definition, are generally

considered securities. See, e.g., Nor-Tex Agencies, Inc. v. Jones, 482 F.2d 1093 (5th Cir. 1973); S.E.C. Release No. 33-4877, CCH Fed.Ser.L.Rptr. ¶1046. There is a strong presumption that limited partnership interests are securities, but whether a particular limited partnership interest constitutes a security requires an independent consideration of the Howey definition. See Stowell v. Ted S. Finkel Investment Services, Inc., 489 F.Supp. 1209 (S.D. Fla. 1980). Consideration of Howey shows that the interest purchased by Gordon does not constitute a security.

The Florida Uniform Limited Partnership Act, Fla. Stat. §620.01, et seq. (1979) gives a limited partner the right to inspect partnership books, request an accounting, seek dissolution

of the partnership and to receive a share of partnership profits. Fla. Stat. §620.10. A limited partner has no right to participate in decisions affecting the disposition of partnership property and if he does participate he loses his status as a limited partner. Fla. Stat. §620.07. Limited partnership interests are freely transferrable. Fla. Stat. §620.19. The general partners have virtually absolute control over all decisions affecting the business of the partnership including sales of the partnership's real property. Fla. Stat. ¶620.09. Because of these provisions, most limited partnership interests in Florida constitute securities.

The Barley limited partnership, however, does not comply with the

Florida Limited Partnership Act. Unlike typical limited partners, the Barley limited partners have the right to participate in decisions regarding sale of the partnership's real property.[3]

[3] Paragraph 19.2.1 of the Barley partnership agreement provides:

> Nothwithstanding any other provisions of this agreement, before any sale of real property owned by the Partnership may be consummated, the General Partner shall, more than fifteen days prior to the consummation of the proposed sale of the property, notify each of the limited partners in writing of such proposed sale and of all of the terms and conditions of the proposed sale. Provided, however, such notice shall not be necessary to establish authorization of the General Partner to make a sale if affirmative approval of or consent to the proposed sale has been received from the holders of 51% of the outstanding capital account units. Such notice shall be made by first class mail, postage prepaid, at the address of each Limited Partner as shown in the records of the Limited Partnership.

Under the Florida Partnership Act, general partners, not limited partners, are given the right to participate in such decisions. See Fla. Stat. §620.09, .605 (1979). Moreover, like general partnership interests, the Barley limited partnership interests are not freely assignable.[4] Compare Fla. Stat. §620.19 (limited partnership interest assignable) with Fla. Stat. §620.69 (general partnership interest may be assigned only by agreement of other partners).

[4] Paragraph 17.1 of the Barley Partnership Agreement provides:

> No partner shall have the right to sell, transfer, pledge, or otherwise dispose of his interest in the Partnership, or any portion thereof, without first obtaining written consent of the General Partner.

Since the Barley limited partnership does not have the attributes of the typical limited partnership, closer consideration of the Howey elements is required to determine whether the limited partnership interests are securities. Merely labeling the agreement a limited partnership does not relieve the Court of the necessity of analyzing the transaction in light of the Howey definition of a security. Economic reality, not the labels affixed to an interest determine whether a security has been alleged. See Tcherepin v. Knight, 389 U.S. 332, 336 (1967), United Housing Corp. v. Forman, 421 U.S. 837, 351-52 (1975). The Barley limited partnership interests are not a security because they lack the elements of (1) profit, (2) from the efforts of

others.

As discussed above, profits for purposes of the securities laws do not include gain from the appreciation of land. The profits from the limited partnership, like those from the trust agreements, were to come solely from appreciation of land. No development of the land was contemplated. The partnership appears to have been created solely for the purpose of holding the land in hopes that the real estate would appreciate.

Moreover, while the scope of control retained by the Barley limited partners is somewhat less than that retained by the trust beneficiaries, it is clear that the limited partners did retain control over the only decisions which would materially affect the success of

the scheme. See SEC v. Glenn Turner, supra. No sale of the Barley tract could be consummated without the express consent of the limited partners. Since the only apparent purpose of the partnership was to hold the land for resale, the limited partners effectively controlled the only decision of the partnership which would affect profits. Gordon, as holder of a 30% interest in the partnership, had significantly more control over whether the partnership realized a profit than even the general partner. Accordingly, it cannot be said that profit was to arise solely from the efforts of others.

The Court concludes that interests in the Barley limited partnership, like interests in the various trust agreements, are not securities. The

counts of the plaintiff's complaint dealing with securities must be dismissed.

II. Plaintiff's proposed Amendment to include RICO violations.

The plaintiff, on the eve of oral argument on the securities issue, filed a motion for leave to amend his complaints to allege violations of the Racketeering Influenced and Corrupt Organization Act (RICO). 18 U.S.C.A. §1961 et seq. (Supp. 1980).

Leave to amend is freely granted under Fed.R.Civ.P. 15(a). See Foman v. Davis, 371 U.S. 178, 182 (1962):

> In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by

> virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be 'freely given.'

Several of the factors mentioned in Foman as sufficient to support a denial of leave to amend are present here.

1. Undue delay.

These cases were originally filed in March of 1976. If any facts support the RICO charge they were certainly as available then as they are now. The plaintiff has filed numerous amended complaints and amendments to his amended complaints. In none of his previous amendments did the plaintiff even hint at this new theory. The plaintiff has offered no valid reason for the delay. His failure to offer any justification for this delay is sufficient reason to deny leave to amend. See, e.g. Wealden

Corp. v. Schwey, 482 F.2d 550, 552 (5th Cir. 1973).

2. Bad faith or dilatory motive.

The plaintiff in his memorandum candidly admits the purpose behind this latest amendment. Plaintiff filed the motion solely to delay decision on the security issue. The motion is patently in bad faith and cannot be condoned even under the liberal standard of Rule 15. See, e.g. Billy Baxter, Inc. v. Coca-Cola Co., 47 F.R.D. 345, 346 (D.C.N.Y. 1969), aff'd., 431 F.2d 183 (2d Cir.) cert. denied, 401 U.S. 954 (1970); Matlack, Inc. v. Hupp Corp., 57 F.R.D. 151 (D.C.Pa. 1972).

3. Repeated failure to cure deficiencies by amendments previously allowed.

The number of amended complaints and amendments to amended complaints allowed in this action has already been described. Reference to the Fifth Circuit's opinion and the subsequent history of these cases demonstrate the substantial deference afforded this Plaintiff. Further amendments, not directed at clarifying his existing claims, but solely at delaying final resolution of the cases cannot be tolerated.

4. Undue prejudice.

The proposed RICO amendment presents an entirely new issue which could not have been anticipated by these defendants. As a result, allowing the amendment would force the defendants to incur even greater expense in defending this action. The defendants have

already been subjected to one fruitless appeal as a result of the plaintiff's abuse of the federal rules of pleading and should not be forced to suffer any greater delay in reaching a just resolution of these cases.

5. Futility.

The Court notes that there is substantial doubt as to whether the proposed amendment even states a cause of action. Compare Barr v. WUI/TAS, Inc., 66 F.R.D. 109 (S.D.N.Y. 1975) (allegations of mail fraud without some showing of defendant's connection to organized crime does not state a civil cause of action under RICO) with Pannes v. Heinhold Commodities, Inc., 487 F.Supp. 645 (N.D. Texas 1980) (allegations of mail fraud alone may state civil cause of action under RICO).

For the foregoing reasons the Court concludes that leave to amend to add Count IX to plaintiff's third amended complaint must be DENIED.

III. The Pendent State Claims.

In the Order dated September 30, 1976 the Court concluded that exercise of pendent jurisdiction over the remaining state claims after dismissing the federal securities claims was inappropriate. Relying on United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) the Court concluded that since the only federal claim was dismissed before trial, exercise of pendent jurisdiction was unwarranted. See generally, Stowell v. Ted S. Finkel Investment Services, Inc., 489 F.Supp. 1209, 1214-1218 (S.D.Fla. 1980)

(assertion of pendent jurisdiction over Florida fraud claims in a federal securities action is generally inappropriate).

Generally if a federal claim is dismissed before trial, the court must dismiss all pendent state claims absent extraordinary circumstances. See Kavit v. A.L. Stamm & Co., 491 F.2d 1176 (2d Cir. 1974); Hendrickson v. Westland Material Corporation, 463 F.Supp. 826 (S.D. Fla. 1978). The plaintiff has pointed to two considerations which he maintains require the Court to retain jurisdiction over the pendent claims: (1) If the pendent claims are dismissed, the plaintiff may be barred from complete recovery because of the applicable statutes of limitation and; (2) if the pendent claims are dismissed,

all the time and money expended by the plaintiff in pursuit of his federal claims will have been wasted. The Court finds these consideration unpersuasive.

The plaintiff has already filed five separate actions in state courts which deal with essentially the same issues as alleged in this action. Circuit Court of Orange County Nos. 77-3782, 3783, 3784 (Barley, Overstreet and Terry). Circuit Court of Broward County No. 77-7145 (Hobe) and Circuit Court of Martin County No. 77-377 (Hamm). The only claims which appear to be barred by the statute of limitation are some of the plaintiff's claims for violation of the state securities laws. Gordon v. Overstreet, 373 So.2d 476 (Fla. 4 DCA) cert. denied, 376 So.2d 72 (1979). The Court has already concluded that the

plaintiff has not alleged a federal security. In view of the Court's resolution of that issue and Weiner v. Brown, 356 So.2d 1302 (Fla. 3 DCA 1978) (discussed above) the Court would be compelled to conclude that no state security has been alleged. Accordingly retention of the state security claims would not be helpful to the plaintiff.

The plaintiff's various claims of fraud and breach of fiduciary duty are governed by Fla. Stat. §95.11(3)(1)(p) which provide for limitations periods of four years from the date the fraud is "discovered or should have been discovered." Fla. Stat. §95.031(2). Plaintiff filed his various state claims in May of 1977 and has stated that he discovered the fraud in March 1976. Clearly, his claims are not barred by

the applicable Florida Statute. Moreover, to the extent that any claims are barred, they are the result of the plaintiff's failure to file his state claims immediately after this Court's original dismissal in September 1976 put him on notice that his claims might not be cognizable in federal court.

Plaintiff's contention that the Court sould retain jurisdiction because of the expense he has already incurred in pursuing his federal claims is absurd. The vast majority of plaintiff's expense is a direct result of his own failure to comply with the federal rules. As the Fifth Circuit stated in its opinion vacating this Court's original dismissal:

> If our holding results in more time and expense to appellant, that would be fair recompense for these marked, unjustifiable violations of the letter and spirit of the Federal Rules of Civil Procedure and an indifference as though they had never been adopted 41 years ago.
> 602 F.2d at 747

With the demand on this district by the Speedy Trial Act and civil actions of which there is clear jurisdiction, it is unreasonable to expect pendent jurisdiction to be retained under the circumstances present in these cases. The plaintiff has failed to show any reason for retaining jurisdiction over the remaining state claims and they are hereby dismissed.

For the foregoing reasons, the defendants' motions for summary judgement are GRANTED. The plaintiff's

claims based on the federal securities laws are dismissed with prejudice. The pendent state claims are dismissed without prejudice. The plaintiff is free to pursue his claims in state court.

DONE AND ORDERED at Miami, Florida, this 5th day of September, 1980.

/s/ Clyde Atkins
UNITED STATED DISTRICT JUDGE

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All Counsel of Record

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-5797

EDWIN F. GORDON,
Plaintiff-Appellant

versus

GEORGE A. TERRY, SR., Et Al.,
Defendants-Appellees.

No. 80-5798

EDWIN F. GORDON,
Plaintiff-Appellant

versus

M. M. OVERSTREET, Et Al.,
Defendants-Appellees.

No. 80-5799

EDWIN F. GORDON,
Plaintiff-Appellant

versus

E. G. GREEN, Et Al.,
Defendants-Appellees

No. 80-5800

EDWIN F. GORDON,
Plaintiff-Appellant,

versus

HOBE PROPERTIES, INC., Et Al.,
Defendants-Appelles.

No. 80-5801

EDWIN F. GORDON,
Plaintiff-Appellant,

versus

WILLIAM HERSEY HAMM, III, Et Al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITIONS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion: August 30, 1982, 11 Cir., 1982, _____F.2d _____.)
(, 1982)

BEFORE FAY, VANCE, and ARNOLD*, Circuit Judges.

PER CURIAM

The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing enbanc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are also DENIED.

ENTERED FOR THE COURT:

(s) Peter Fay
United States Circuit Judge

*Hon. Richard S. Arnold, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX "D"

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

EDWIN F. GORDON,

Plaintiff

AFFIDAVIT OF PLAINTIFF

vs.

GEORGE A. TERRY, SR., ET AL.,

76 Civ. 1461

Defendants Judge Robert J. Ward

vs.

M.M. OVERSTREET, ET AL.,

76 Civ. 1462

Defendants Judge Robert J. Ward

vs.

WILLIAM HERSEY HAMM, III, ET AL.,

76 Civ. 1465

Defendants Judge Robert J. Ward

vs.

HOBE PROPERTIES, INC., ET AL.,

76 Civ. 1466

Defendants Judge Robert J. Ward

vs.

E.G. GREEN, ET AL.,

76 Civ. 1931

Defendants Judge Robert J. Ward

STATE OF FLORIDA

COUNTY OF BROWARD

Personally appeared before me, a Notary Public in and for said State and County, EDWIN F. GORDON, to me known, who being duly sworn, deposes and says:

1. I am the Plaintiff in the above five causes of action and I am personally familiar with the background, circumstances and personalities involved in these matters. . . .

5. I am formulating this Affidavit in an admittedly somewhat unusual manner, but in a manner which I most sincerely believe is fitting and proper for the highly unusual circumstances that characterize these five very closely related cases. I am, for the convenience of the Court as well as all Defendants in all five cases, going into considerable detail as to the first case to be filed in the Court, 76 Civ. 1461, involving George A. Terry, Sr., Et Al, as Defendants, which contains well documented evidence to substantiate all

substantive factors which appear in all the cases. Then I am attaching a comparative analysis for the substantive factors which appear in each of the five cases, as compared with the same substantive factor in other cases. . . .

8. I am now presenting below, a brief summary of the salient facts and factors in the Terry case, both for the information of the Court and for the information of all others who read this Affidavit. . . . [t]he real substance of the set-up regarding the Terry securities (as well as the securities involved in the other four closely related cases) was that Green, assisted by Broberg as his attorney, assumed full and complete management authority in the text-book sense of the person or persons

"to whose efforts I, as an investor in these common enterprises, looked to produce the hoped-for profits in each enterprise."

My point is that, regardless of any particular writings that might appear in any one or more of the five cases, the fact that a particular writing does not appear in the files of a given case, is in the nature of an administrative and/or operational detail, WHICH IN NO WAY CHANGES THE OVERRIDING SIMILARITY IN SUBSTANCE OF ALL FIVE CASES.

I. The Terry Case - 76 Civ. 1461

The facts in the Terry Case are simple and to the point. The owners of the Terry real estate and the Terry cattle ranching operation in Orange County, Florida, through their Orlando

attorney, Robert C. Matthias, conspired with E.G. Green and Gustave T. Broberg, Jr. to greatly inflate the true value of the lands underlying the Terry securities, mislead the other people in the investment syndicate put together by Green, and deliberately omitted to inform the other people in the investment syndicate, that the Terry ranch lands had been (just a few months before the sale of the Terry securities) re'classified by the Board of County Commissioners of Orange County, Florida so that the lands were either classified as "Flood Plains," or as "Agricultural."

In Florida real estate of substantial size which is not in a city, the "Agricultural" classification is to be expected; however, when investors

pool their money (as the investors did in the case of the Terry securities) and permit a trusted fiduciary agent such as Green to invest the pooled money in land presently classified as "Agricultural," the usual expectation is that the powers-that-be in the particular area will, in due course, change the land classification from "Agricultural" to something else which is more conducive to development as residential, commercial or otherwise.

This is the type of normal development pattern that was represented by Green to the investors, including myself, and was a falsehood. Green deliberately misled me (both by commission and by omission) on several other key points about the Terry

situation that I needed in order to make an informed investment judgment, including the following:

(a) Green did not inform me about the drastic land reclassification action taken by the Orange County Commissioners, several months before the investment syndication bought the Terry securities.

(b) Green affirmatively mislead me and affirmatively misinformed me when he told me that the lands underlying the Terry securities could be developed into commercial areas and residential areas. This was a falsehood, and Green knew it or should have known it.

(c) Green affirmatively mislead me and affirmatively misinformed me when he stated that the underlying lands in the

Terry securities were a "great bargain" and that "buyers are waiting in the wings to buy from your group." In fact, the underlying lands were greatly overpriced, and no buyers were in evidence to "take out" our investment syndication.

(d) Green mislead me by omission when he failed to disclose to me that the Terry Cattle Ranch operation had been losing money for several years; Green further mislead me by omission when he failed to tell me that the Magnolia Ranch as an overall entity had been losing money due to high mortgage interest cost on a highly leveraged first mortgage in favor of Federal Land Bank of Columbia, South Carolina.

Broberg was as substantially in the wrong in the Terry transaction as Green was; and Broberg joined in the affirmative misrepresentations made by Green . . .. Green and Broberg were in constant and ongoing communication; and whatever Green knew about the underlying real estate, Broberg was also charged with the same knowledge. To add insult to injury, Broberg permitted myself and the other third-party investors to pay him substantial feel for so-called "legal services rendered to me," when (in actual fact), Broberg was representing the interests of Green and the sellers of the Terry securities.

I also want to clarify, once and for all, this question:

> "Was the Terry situation run by the investment syndicate, or was the Terry situation run by third-parties to whom the money investors looked for the generation of profit in the enterprise as a whole?"

My answer to this question is clear and unequivocal:

> "The Terry situation was NOT run by the investment syndicate; the Terry situation was run by Green (assisted by Broberg as his attorney), who also was the real and substantial mangagement power with respect to the Terry cattle ranch operation, directing George Terry, Jr. and others who had certain day-by-day ranching and related duties to perform under the so-called Management Services Contract of June 12, 1973 with Terry Cattle Company."

. . . representations made to me by Green and Broberg, regarding the actual management functions that they (Green and Broberg) were taking on--regardless of what a so-called trust agreement or

any other written instruments might seem (on its face) to say to the contrary.

QUESTION:

Did the issuers of the securities make any disclosures or other representations to me, as an investor, with respect to the above?

ANSWER:

76 Civ. 1461 Terry

No. All contacts of any kind on these matters were through Green, Broberg and their creature corporation, known as The Heminway Corporation. The issuers of the securities made no moves to make disclosure of any of the factors pertaining to the underlying real

estate that would have been material to an investor considering an investment in these securities.

76 Civ. 1462 Overstreet

Same as above.

76 Civ. 1465 Hamm

Same as above.

76 Civ. 1466 Hobe

Same as above.

76 Civ. 1931 Green (Hovey Securities Resale)

Same as above.

QUESTION:

Did Green and Broberg solicit my confidence in them as professional fiduciaries?

ANSWER:

76 Civ. 1461 Terry

Yes; and furthermore, insisted upon having their investors put full confidence in their investment advice, decisions, and management control as a prerequisite for doing business with them as an investor.

76 Civ. 1462 Overstreet

Same as above.

76 Civ. 1465 Hamm

Same as above.

76 Civ. 1466 Hobe

Same as above.

76 Civ. 1931 Green (Hovey Securities Resale)

Same as above.

QUESTION:

Who represented the issuers of the securities as attorney-at-law and was paid legal fees by the issuers, either directly or indirectly?

ANSWER:

76 Civ. 1461 Terry

Broberg.

76 Civ. 1462 Overstreet

Broberg.

76 Civ. 1465 Hamm

Broberg.

76 Civ. 1466 Hobe

Broberg.

76 Civ. 1931 Green (Hovey Securities Resale)

Broberg.

QUESTION:

Who represented E. G. Green (as securities salesman in these securities issues), and otherwise represented E. G. Green as his attorney-at-law?

ANSWER:

76 Civ. 1461 Terry

Broberg.

76 Civ. 1462 Overstreet

Broberg.

76 Civ. 1465 Hamm

Broberg.

76 Civ. 1466 Hobe

Broberg.

76 Civ. 1931 Green (Hovey Securities Resale)

Broberg.

QUESTION:

Did Broberg (in fact) represent the issuers of the securities at the same time that he was holding himself out as representing my best

interests (as my attorney) in these various securities transactions?

ANSWER:

76 Civ. 1461 Terry

Yes; and furthermore, Broberg never suggested that I have independent counsel, but gave the impression he and Green were professional fiduciaries acting in my behalf and in my best interest.

76 Civ. 1462 Overstreet

Same as above.

76 Civ. 1465 Hamm

Same as above.

76 Civ. 1466 Hobe

Same as above.

76 Civ. 1931 Green (Hovey Securities Resale)

Same as above.

QUESTION:

Did Broberg ever make any disclosure to me of this conflict of interest?

ANSWER:

76 Civ. 1461 Terry

No. He assured me my interests were in good hands and he and Green would handle any question I might have.

76 Civ. 1462 Overstreet

Same as above.

76 Civ. 1465 Hamm

Same as above.

76 Civ. 1466 Hobe

Same as above.

76 Civ. 1931 Green (Hovey Securities Resale)

Same as above.

QUESTION:

Did I have outside counsel in any of these cases, and did either Green or Broberg ever recommend that I obtain outside counsel?

ANSWER:

76 Civ. 1461 Terry

No. I relied completely on Green and Broberg and they solicited a fiduciary relationship with me.

76 Civ. 1462 Overstreet

Same as above.

76 Civ. 1465 Hamm

Same as above.

76 Civ. 1466 Hobe

Same as above.

76 Civ. 1931 Green (Hovey Securities Resale)

Same as above.

QUESTION:

What disclosure was made of relevant factors pertaining to underlying real estate for each of the securities issues, with knowledge of which an investor would have been

likely not to invest in the securities?

ANSWER:

76 Civ. 1461 Terry

None. Green stated he had found an investment of great profit potential and solicited my investments based upon complete confidence in his promise to handle everything and make a profit on my investment dollars.

76 Civ. 1462 Overstreet

Same as above.

76 Civ. 1465 Hamm

Same as above.

76 Civ. 1466 Hobe

Same as above.

76 Civ. 1931 Green (Hovey Securities Resale)

Same as above.

QUESTION:

What are some of the salient factors that I have uncovered (through the independent investigations of myself and my agents) with respect to the actual state of affairs of the true and proveable realistic economic values of the real estate underlying each of the securities which are the subject of the following cases at Bar?

ANSWER:

76 Civ. 1461 Terry

Not worth the price paid, loss

operation in agriculture, no development potential.

76 Civ. 1462 Overstreet

Not worth price paid, large hard-to-market parcel.

76 Civ. 1465 Hamm

Not worth price paid, large hard-to-market parcel.

76 Civ. 1466 Hobe

Same as above.

76 Civ. 1931 Green (Hovey Securities Resale)

Same as above.

QUESTION:

Did Broberg, in behaving as though he were my attorney and professional fiduciary, ever advise me that I was investing in securities, and that Green was a securities salesman.

ANSWER:

76 Civ. 1461 Terry

No. Brogerg expressed to me his happiness for me that I made the fortunate decision to be one of the lucky people to invest with Green with whom Broberg had a long and completely honorable and fantastically successful business association and he assured me my investment with Green was in good hands, thereby giving Green his personal endorsement.

76 Civ. 1462 Overstreet

Same as above.

76 Civ. 1465 Hamm

Same as above.

76 Civ. 1466 Hobe

Same as above.

76 Civ. 1931 Green (Hovey Securities Resale)

No. Broberg remained silent although he knew of the transaction and told me I was making a good deal on this Green resale.

QUESTION:

Did Broberg advise me as to Green's conflict of interest as agent for

the sellers and as investor fiduciary?

ANSWER:

76 Civ. 1461 Terry

No. Broberg stated that Green was an unusually honorable and talented man who was often involved in very complicated roles in business, but that Broberg had found Green to be able to sort out the right thing to do for all parties who trusted in him and Broberg further stated high high regard for Green and Green's record of fulfilling his promise of making profits for his investors and Broberg advised me to let Green handle everything as Green requires and all will go well and if there are any detailed matters that come

up, then all of the files and records on this complicated deal are in Broberg's office so he can answer any queries for me, presumably as my attorney advisor.

76 Civ. 1462 Overstreet

Same as previous answer.

76 Civ. 1465 Hamm

Same as above.

76 Civ. 1466 Hobe

Same as above.

76 Civ. 1931 Green (Hovey Securities Resale)

No. Broberg remained silent although he worked actively with

Green to sell the deal to the Barley investment syndicate.

QUESTION:

Did I meet or discuss this investment with the other investors in the group before making my investment decision?

ANSWER:

76 Civ. 1461 Terry

No. Green and Broberg stated that it was a hard and fast rule of investing with Green that there was no contact between investors and such contact was all to be handled by Green or Broberg in behalf of Green or the trustee exclusively to protect the identity and privacy from the public eye of these

important jet-set personalities and they used the example over and over again of Henry Ford II as a typical renowned investor person who did not want to be bothered with details and just wanted results in the form of investment profits as promised by Green and Ford had complete faith and put complete reliance in Green and Broberg to handle investments for him and further, that I, as an investor, should not expect to socialize with any investor by means of introductions by Green and/or Broberg because the privacy of these important people was being protected by Green and Broberg as a matter of policy with Green.

76 Civ. 1462 Overstreet

Same as previous answer.

76 Civ. 1465 Hamm

Same as above.

76 Civ. 1466 Hobe

Same as above.

76 Civ. 1931 Green (Hovey Securities Resale)

No. Barley made all the contacts with other limited partners and I have not met the other partners at any time and Barley has worked with Green in his investment syndicate.

QUESTION:

What representations did Green and Broberg make regarding the so-called trust agreement?

ANSWER:

76 Civ. 1461 Terry

Green and Broberg stated it was merely a simple legal means to hold title to property so public records would not disclose names of important people like Ford, etc. who wished to have privacy.

76 Civ. 1462 Overstreet

Same as previous answer.

76 Civ. 1465 Hamm

Same as above.

76 Civ. 1466 Hobe

Same as above.

76 Civ. 1931 Green (Hovey Securities Resale)

Green and Broberg stated that the same trust arrangement was used in the Barley deal for the usual protection of the sellers who were represented by Green and Broberg as in the other investment syndicates.

QUESTION:

What representations did Green and Broberg make regarding the forfeiture clause in the trust agreement?

ANSWER:

76 Civ. 1461 Terry

Green and Broberg stated that it was a special privilege for me to be a member participant in this exclusive group in investors and that Green always had many other investors anxious to participate in any one syndication, from his following of over 300 great people, and that all of these people relied completely upon Green and Broberg to handle this or any investment for them and that all the other investors required this "forfeiture clause" to be assured that they as investors would never be called on to fulfill obligations for others in the investment syndicate and for that reason the other investors insisted on a tough forfeiture clause to

protect them, even though Green and Broberg thought it was too tough and had never been tested as to legality in trust matters or used against any investor because every investor was always happy to make their payments and keep their membership in the exclusive investment group in good standing.

76 Civ. 1462 Overstreet

Same as above.

76 Civ. 1465 Hamm

Same as previous answer.

76 Civ. 1466 Hobe

Same as above.

76 Civ. 1931 Green (Hovey Securities Resale)

The Barley Limited Partnership Agreement contained similar provisions to enforce timely payments from limited partners.

QUESTION:

Did Green and Broberg explain to me that the trust agreement was really a means to collect money from the investors in behalf of the sellers and the sellers agents, Green and Broberg?

ANSWER:

76 Civ. 1461 Terry

No. Green and Broberg explained to me that the trust agreement was a clever means to assure me of

deductions for interest payments against my income subject to ordinary income tax and to give me a clear-cut capital gain investment treatment by IRS when the property (underlying the securities) was sold and all this per the opinion of the best tax counsel in the country, with whom they consulted for the protection of all their clients in these investment matters.

76 Civ. 1462 Overstreet

Same as above.

76 Civ. 1465 Hamm

Same as previous answer.

76 Civ. 1466 Hobe

Same as above.

76 Civ. 1931 Green (Hovey Securities Resale)

Same as above.

QUESTION:

Did Green and Broberg say they were going to manage the project in each investment syndicate?

ANSWER:

76 Civ. 1461 Terry

Yes. They stated that Green, with any help needed from Broberg, his attorney, assumed complete management and resale authority and that each investor was asked to pledge allegiance to this concept so

Green could direct the trustee and have the trustee turn all information over to him for handling in secrecy so the only contact between the trust and the outside world was through Green; . . .

76 Civ. 1462 Overstreet

Same as above.

76 Civ. 1465 Hamm

Same as above.

76 Civ. 1466 Hobe

Same as above.

76 Civ. 1931 Green (Hovey Securities Resale)

Green has actively worked to sell the Barley property (along with the lands underlying the Overstreet and Hovey deals) as one package and expects to split commissions with Barley on the resale as he did on the private placements of securities as already described in the original pleadings of 76 Civ. 1931, filed on April 28, 1976.

QUESTION:

Did the trustee follow these directions by Green and work with Green as the manager of each investment syndication?

ANSWER:

76 Civ. 1461 Terry

Yes. Any questions directed to the trustee regarding the business of the investment syndicate either from an investor or from the outside world were referred to Green and/or Broberg as Green's attorney, and this was stated to me by the trust officer handling these matters.

76 Civ. 1462 Overstreet

Same as above.

76 Civ. 1465 Hamm

Same as above.

76 Civ. 1466 Hobe

Same as above.

76 Civ. 1931 Green (Hovey Securities Resale)

George Barley performed the management function directly, but allowed Green to present the property underlying the respective investment syndications for sale by Green to others as part of a larger package deal, including the Overstreet, Hovey and Barley tracts combined.

QUESTION:

Was a formal arrangement ever made with Green to manage the affairs of the trust?

ANSWER:

76 Civ. 1461 Terry

No. Green stated that he wanted to remain low-key and inconspicuous in the business world so other brokers

and business people would not know how extensive his control of business matters was in any given area or so others would not know of his specific investment control, so he would be free to gather information and wheel and deal for the benefit of his investors to whom he was devoting his life and sacred honor, so he could fulfill his promise to make a profit for his investors in keeping with his self avowed great performance record, so Green stated he wanted nothing in writing as to his management authority over the trust business and so it was handled by him secretly.

76 Civ. 1462 Overstreet

Same as above.

76 Civ. 1465 Hamm

Same as above.

76 Civ. 1466 Hobe

Same as above.

QUESTION:

Did Green ever admit to his various investment syndications that he is the paid agent representing the sellers, at the same time that he is functioning as the exclusive management and control element in directing the affairs of each investment syndication?

ANSWER:

76 Civ. 1461 Terry

Yes. At a meeting of the investors in each investment syndication at the Holiday Inn, Jupiter, Florida, on January 30, 1976 (which meeting was called and arranged for by Green and Broberg on their own volition, even to the extent of getting hotel rooms for those attending the sessions), Green stated clearly to the investors in each investment syndication that he is the paid agent representing the sellers to be paid his commission on all principal and interest payments made by the buyers (investors), and he also stated that he is the exclusive management and control element in

directing the affairs of each investment syndication, including possible resales to other groups of investors.

During the Jupiter sessions, Green repeated what I have so often heard him say during the approximately 5-1/2 years that I have known him, which is substantially as follows:

"Keep on trusting me as you always have, and I assure you that things will come out O.K. and you will make lots of money on your investments through me. Let me keep on handling matters for your benefit, as in the past."

76 Civ. 1462 Overstreet

Same as above.

76 Civ. 1465 Hamm

Same as above.

76 Civ. 1466 Hobe

Same as above.

/s/
Edwin F. Gordon

Sworn to and subscribed
before me this 17th day
of May, 1976.

/s/ Allen D. Gordon
Notary Public

APPENDIX "E"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EDWIN F. GORDON,
Plaintiff,
v. Case No. 76-8151-Civ.CA

GEORGE A. TERRY, SR.,
et al.,
Defendants
_____/

EDWIN F. GORDON,
Plaintiff,
v. Case No. 76-8152-Civ.CA

THE ESTATE OF M. M. OVERSTREET,
et al.,
Defendants
_____/

EDWIN F. GORDON,
Plaintiff,
v. Case No. 76-8153-Civ-CA

WILLIAM HERSEY HAMM, III,
et al.,
Defendants.
_____/

EDWIN F. GORDON,
Plaintiff,
v. Case No. 76-8154-Civ-CA

HOBE PROPERTIES, INC.,
et al.,
Defendants.

EDWIN F. GORDON,
Plaintiff,
v. Case No. 76-8155-Civ-CA

E. G. GREEN, et al.,
Defendants.

AFFIDAVIT OF EDWIN F. GORDON

STATE OF FLORIDA)
: SS
COUNTY OF DADE)

EDWIN F. GORDON, being first duly sworn on oath, deposes and states that he has personal knowledge of the following facts, unless otherwise indicated, and if called to the stand and sworn on oath, he would be competent to testify thereto:

2. Affiant first met Defendant E. G. Green on October 13, 1970. At that time, Affiant had about one million dollars in cash and a net worth of five million dollars. By the time Green was through with Affiant, Affiant's cash was gone, he owed two-to-three million dollars, and was committed to make ten million dollars more in payments to various Green investment contracts.

3. At this first meeting, Green explained to Affiant that none of this investors such as Affiant would have "any relationship with each other, that they would deal only with Green, Broberg and the First National Bank in Palm Beach". Green told Affiant to "leave him alone", that he, Green, would manage

Affiant's money and resell the underlying tracts that he had selected in less than two years to developers or other syndicates at large profits.

4. Green told Affiant that he was able to make this promise since, he, Green, was an expert in the areas where the lands that he selected were located, and that because of his expertise and contacts he, Green, was able to assure Affiant that the underlying tracts that he had selected would be resold by him within two years at large profits.

5. Green also explained that his team of money managers consisted of the First National Bank in Palm Beach, which would act as trustee, and Attorney Gustave T. Broberg, who would prepare

the documents, and along with the First National Bank in Palm Beach and Green, would help manage the properties and help resell them.

6. Affiant did not receive any of the trust documents until long after he had made his initial decision to invest and he invested thousands of dollars in each investment contract.

7. Affiant was not aware that any trust documents provided for majority beneficiary control of the investment contracts until litigation threatened.

8. Affiant was never consulted about the operation or management of his money by anyone. Affiant placed his entire reliance on Green, Broberg and the First National Bank in Palm Beach to

select the right properties, manage the properties, and resell them at large profits.

9. In investing approximately $4.3 million dollars in the investment contracts sued upon in these cases, Affiant relied solely upon the expertise of Green, the First National Bank in Palm Beach, and Broberg, to select the right properties, and their represented ability to resell the properties they selected at substantial profits through their intimate knowledge of the area in which the properties were located, and their contacts with developers and other persons dealing in investment-type tracts.

FURTHER, AFFIANT SAYETH NOT.

/s/
EDWIN F. GORDON

Subscribed to and sworn
to before me, this 26th
day of April, 1980

/s/ John W. Kern
Notary Public, State of Florida
At Large

APPENDIX "F"

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

EDWIN F. GORDON,

Plaintiff,

v.

GEORGE A. TERRY, SR., et al,

Defendants.

CASE NOS. 76-8151-Civ-CA
76-8152-Civ-CA
76-8153-Civ-CA
76-8154-Civ-CA
76-8155-Civ-CA

STATE OF FLORIDA

COUNTY OF DADE

PLAINTIFF'S AFFIDAVIT

Plaintiff EDWIN F. GORDON, being first duly sworn on oath, deposes and states that he has personal knowledge of the following facts, unless otherwise indicated, and if called to the stand

and sworn on oath he would be competent to testify thereto:

1. Affiant has read the statements contained in his Third Amended Complaints in these cases and believes that they are true and correct and adopts them.

2. I did not purchase any interest in real estate. Due to the trust nature and the limited partnership nature of these syndicates, and the forfeiture provisions, I did not purchase any interest in the real estate. Attached and made part hereof is a copy of Defendant Gustave T. Broberg, Jr.'s (the architect of the syndicates) letter of October 3, 1971, to T. T. Oughterson, Esq. which confirms this. Mr. Brogerg states in part:

> "In many instances where participants have died, we have always thought his interest to be of an intangible nature much like the ownership of a share of stock or a participant in any trust. I do not think the State of Florida is involved since the participants do not, in fact own any interest in real property." (Emphasis added.)

As Mr. Broberg states, my interest in these syndicates was like that of a share of stock. Due to the nature of these syndicates, i.e., trusts and limited partnership, which contain forfeiture provisions, neither I nor any other participant had any interest in the underlying properties and due to the forfeiture provisions neither I nor any other participant obtained anything until either all payments were made or the underlying properties were resold. Every payment I made was a deduction from my net worth. I had no equity in any of these properties.

3. I granted Defendant Green a discretionary account to manage my capital. I was not to and did not participate or have or exercise any control over the selection of the lands purchased by Green, the management of the lands, or the resale of the lands, or any other phase of the operation of the syndicates. Defendant Green told me that he would select the lands, that his Heminway Corporation would buy the lands, that he would manage the lands, and that he would resell the lands without any participation from me and that I should not interfere in any form or fashion in Green's selection of the lands, management of the lands or resale of the lands. My role was limited solely to making payments. I never read any of the trust documents until long after I

made my decision to invest and as far as I am concerned, the trust documents formed no part of the deal.

4. My profits were <u>not</u> to come from appreciation but from Green's expert ability to find bargains and a unique ability to find repurchasers at favorable prices. Green's abilities and efforts were the quintessence of my investment. Without Green's unique abilities and efforts, the bargain lands could not have been found, nor the high-price repurchasers be located. What Green represented to me and what I thought I was buying was his unique expertise to select bargain-priced lands which he could tie up for minimum downpayments and which he could resell to buyers whom only he knew of for far higher prices. My investments with

Green were not appreciation deals but rather investments in a common enterprise where my profits would be derived solely from the efforts and expertise of Green and his team of Broberg and the First National Bank in Palm Beach of leveraging my capital without any participation on my part into large profits for me, as well as my co-investors. My only function was to supply the capital. Had I been looking for appreciation due to inflation or other external or exogenous factors, I would have selected the properties myself and purchased them outright myself, without having anything to do with Green and his team. It was because Green represented to me that due to his unique abilities and expertise he could find huge bargain-priced lands and

resell them to high-priced repurchasers without any assistance or interference from me, that only through Green could I participate in highly leveraged deals with his stable of wealthy, big-name investors, including Henry Ford II and the Pillsburys, that otherwise would not be available to me, that persuaded me to turn my funds over to Green and his team. . . .

7. I was never furnished with any prospectuses or any copies of any registration statements, or provided with any information whatsoever about the properties. I relied entirely on Green to make the decisions as to what to buy and from whom to buy it, what price to pay and when to sell, to whom to sell and at what price. I knew nothing whatsoever about the

properties. I never saw the lands. Indeed, Green told me that I was not allowed to see them. . . .

11. Green said that he used the First National Bank in Palm Beach as trustee for the syndicates which, together with Gustave T. Broberg, Jr., performed the bookwork, managed the properties and looked after the interests of the investors. Green also said that the trust vehicle that he used kept the identity of his wealthy investors secret. . . .

15. I believed Mr. Green's statements. I trusted him completely, as well as his team of Gustave T. Broberg, Jr. and the First National Bank in Palm Beach. The president of The First National Bank in Palm Beach, William K. deVeer, repeatedly told me

what a brilliant fellow Green was, how fortunate I was to be one of his investors, which was also confirmed by the attorney Green selected to represent me in these transactions, Gustave T. Broberg.

16. Relying upon Green's representations and those of Gustave T. Broberg, Jr. and the First National Bank in Palm Beach, I turned over one million dollars in cash to be invested by Green and his money management team at his discretion. My initial one million dollar investment grew to a total investment of $4.3 million dollars, which was paid to Green, the First National Bank in Palm Beach and Broberg, in more than 100 payments, from the years 1971 through 1976, to be invested at their discretion. For these payments

I have received absolutely nothing to date. I did not purchase any interest whatsoever in real estate. . . .

19. Green managed to embark me on syndicates which, had I made all the payments called for until the syndicates were paid in full, I would have paid out approximately ten million dollars in payments, approximately double my net worth of five million dollars at that time, which was well known to Green, the First National Bank in Palm Beach and Gustave T. Broberg, Jr., when they set me on this course.

20. Throughout the course of my payments to Green, Broberg and the First National Bank in Palm Beach, I was repeatedly promised by Green, Broberg and the First National Bank in Palm Beach that they were effectuating

resales, that they were finding buyers, that the deals were in the fire, that I only had one more payment to make and that they would make me rich. In fact, they even arranged a loan for me at the First National Bank in Palm Beach, in excess of half a million dollars, so that I could make further payments. . . .

FURTHER, AFFIANT SAYETH NOT.

EDWIN F. GORDON

Subscribed and sworn to
before me, this 21st day
of July, 1980.

Notary Public, State of
Florida At Large

APPENDIX "G"

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

EDWIN F. GORDON,

Plaintiff,

v.

GEORGE A. TERRY, SR., et al,

Defendants.

CASE NOS. 76-8151-Civ-CA
76-8152-Civ-CA
76-8153-Civ-CA
76-8154-Civ-CA
76-8155-Civ-CA

STATE OF FLORIDA

COUNTY OF DADE

PLAINTIFF EDWIN F. GORDON'S

SUPPLEMENTAL AFFIDAVIT

Plaintiff Edwin F. Gordon files this Supplemental Affidavit pursuant to the Court's suggestion of July 25, 1980, and being first duly sworn on oath, deposes and states that he has personal knowledge of the following facts, and that if he were called upon his oath and sworn in open court he would be competent to testify to the trust in the matters herein stated:

1. Having heard the Court's inquiry as to factual matters which would distinquish my investments from ordinary real estate transactions and which show that they were security investments, and reviewed the same as well as the documentation with my counsel, the

following factors which are summarized below indicate that I bought a security:

. . .

b. No checks were ever delivered by me at a closing to the sellers when the title to real estate passed. My checks were all made to Green, Broberg or the First National Bank in Palm Beach in return for my security interest in the syndicates.

c. At no time was any allocation of any of the blocks of real estate made to me or recorded in my name. I owned no title, legal or equitable, in any real estate.

d. . . . I did not select any of the properties nor did I see them. . . .

f. My profits were not to come from appreciation but as Green promised from

development of the lands by a member of his pool of developers which he had already lined up who would repurchase the lands from us at a high multiple.

g. Green said I was not to have any control over the management of the syndicates. . . .

h. The trust agreements were not furnished me until long after I had made my decision to invest and had invested hundreds of thousands of dollars, they furnished no part of the representations that led me to invest.. . .

16. Illustrative of Green's manner of operation was the Overstreet syndicate. I first met Green on October 13, 1970, at which time he made the representations that I have stated, which apply to all of my investments at

that time. Green persuaded me to purchase a 10% interest in his Overstreet syndicate. Attached are copies of the following documents which I was furnished with respect to my Overstreet investment: . . .

e. Broberg's letter of February 24, 1971, to me, which states in part: . . .

f. Broberg's letter to the participants in the Overstreet syndicate of March 1, 1971, advising me: . . .

g. Broberg's letter of March 5, 1971, to me, the third page of which refers to "the enclosed Trust Agreement", that I was to sign on page 8.

In his lengthy letter of March 5, 1971, Broberg makes no explanation of the trust agreement or any control I as a beneficiary was supposed to have over

the operation of the trust nor does he make any reference to the tontine penalty type forfeiture provision. Broberg does not even suggest that I read the trust agreement. In fact, I did not read it until long after I signed it. . . .

17. It was not until five months after I made my decision to invest in the Overstreet synidicate that I signed the Overstreet trust agreement on or about March 23, 1971. I did not read the trust agreement before or at the time I signed it and the trust agreement formed no part of my decision to invest in the Overstreet syndicate. By the time I signed the Overstreet trust agreement, I had already invested $125,000 in the Overstreet syndicate.

The trust agreement furnished no part of the representations that had led me to invest in the Overstreet syndicate.

FURTHER, AFFIANT SAYETH NOT.

/s/
EDWIN F. GORDON

Subscribed and sworn to
before me this 30th day
of July, 1980

/s/ John W. Keen
Notary Public, State of Florida
At Large

APPENDIX "H"

§ 771. Civil liabilities arising in connection with prospectuses and communications

Any person who--

(1) offers or sells a security in violation of section 77e of this title, or . . .

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

APPENDIX "I"

§ 77q. Fraudulent interstate transactions

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly--

(1) to employ any device, scheme, or artiface to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make

statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

APPENDIX "J"

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or

appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

APPENDIX "K"

17 C.F.R. § 240.

Rule 10b-5. Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.